

PENINSULAR CONCORD SDN BHD**A****v.****DATUK M KAYVEAS & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR

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HARMINDAR SINGH DHALIWAL JC

[CIVIL SUIT NO: S1-22-150-1997]

28 JULY 2010

LEGAL PROFESSION: *Solicitors - Stakeholders - Monies paid to solicitors as stakeholders - Solicitors arranging to secure roadwork project for plaintiff and its joint venture partner - Whether solicitors acknowledged receipt of monies from plaintiff - Whether there was a stakeholder agreement between parties - Whether letter stating terms of agreement between parties authentic since original not produced - Whether solicitors bound by terms of stakeholder agreement - Whether solicitors held monies in trust for plaintiff pending event - Whether solicitors bound by terms of the arrangement which they had accepted - Whether solicitors breached terms of the agreement - Whether solicitors estopped from changing their position in a way that is inconsistent with what had been agreed*

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EVIDENCE: *Documentary evidence - Secondary evidence - Whether letter stating terms of the agreement between parties authentic since original not produced - Whether parties in possession of original letter - Whether letter could be admitted as secondary evidence - Evidence Act 1950, s. 65*

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TORT: *Defamation - Absolute privilege - Whether plaintiff filed wrongful action against solicitors - Whether solicitors suffered loss of reputation - Whether absolute privilege provides complete immunity from liability for a person's statements - Whether absolute privilege attaches to matters beginning with the institution of the suit together with statements made in pleadings and other documents in the course of proceedings*

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The plaintiff was a company doing contracting work and the defendants were advocates and solicitors. The plaintiff claimed that by a letter dated 1 February 1997 ("the said letter"), a sum of RM470,000 was deposited with the defendants' firm which was to be held by the defendants' firm as stakeholder to abide the securing of a roadwork project by the plaintiff in joint venture with a company known as Dolomite Engineering Sdn Bhd

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- A (“Dolomite”). As no details or information pertaining to the said roadwork project was forthcoming, the plaintiff wrote a letter dated 10 March 1997 to the defendants for return of the said sum. The defendants, however, refused to return the said sum claiming that although they had received the said sum of
- B RM470,000, there was no such stakeholder agreement between the plaintiff and the defendants. The defendants contended that their only role was to release the said sum to the solicitors for one Uniquet Sdn Bhd (“Uniquet”), the consultants for processing the said roadwork project, which they did and that their legal firm
- C acted for Dolomite and not the plaintiff in the release of the said sum. The plaintiff filed this claim for the return of the said sum. The defendants resisted the plaintiff’s claim and had filed a counter-claim for damages of RM200 million for defamation for the filing of this wrongful action against them and for loss of
- D reputation by reason of this suit. The plaintiff thus relied on absolute privilege. The issues that arose for determination were (i) whether the defendants had accepted the said sum of RM470,000 as stakeholders upon construction of the terms of the said letter (ii) whether the authenticity and contents of the said letter could
- E be disputed since the original was not produced in court (iii) whether the terms of the said letter reflected a stakeholding agreement (iv) whether the monies paid were in breach of the terms of the agreement as set out in the said letter and (v) whether the defendants were entitled to damages.
- F **Held (allowing plaintiff’s claim; dismissing defendants’ counter claim):**
- (1) The defendants had made no assertion anywhere that the said
- G letter was not received or executed. They only stated that there was no agreement and appeared to have conceded on the issue of acknowledging receipt of the said letter in the statement of agreed facts. The defendants were thus estopped from changing their position in a way that was inconsistent with what had been agreed in relation to the said letter. The
- H said letter could be admitted as secondary evidence under s. 65 of the Evidence Act 1950. (paras 14, 18 & 25)
- (2) A stakeholding duty arose where money was paid to a solicitor pending the outcome of a future event and such money was
- I held as trustee until the event was known. What he had to

do then would depend on the agreement of the parties. The terms of the said letter clearly reflected a stakeholding arrangement as the release or payment awaited the occurrence of a future event. That future event was information leading to the satisfaction of the plaintiff of the feasibility and viability of the project and authority to release the stakeholder sum. The defendants were bound by the terms of the arrangement which they had accepted. (paras 28 & 35)

- (3) It was open to the defendants to decline acceptance of the cheque when it was first delivered. However, once they had accepted it, they became bound to the terms under which the cheque was given. The plaintiff had never authorized the defendants to release the sum of RM470,000. As a result, there was a breach by the defendants of the terms of the stakeholding arrangement. Thus, the plaintiff was entitled to recover the stakeholder sum. (paras 36 & 37)

- (4) Absolute privilege provided complete immunity from liability for a person's statements. The accuracy of such statements as well as the motives of the person making the statements were irrelevant. This defence was generally available only for parliament and the courts. The rationale for providing this immunity was that free communication was so vital for the proper functioning of the institutions of parliament and the courts that it must override any individual's interest in protecting his or her reputation. Absolute privilege would attach to all matters beginning with the institution of the suit together with the statements made in the pleadings and other documents in the course of proceedings. As such, the defendants' counter-claim could not succeed. (paras 39 & 41)

[Defendants to return stakeholder sum of RM470,000 with interest.]

Case(s) referred to:

Lincoln v. Daniels [1962] 1 QB 237 (*refd*)

Maloney v. Hardy [1970] 216 EG 1582 (*refd*)

Surendra Krishna Roy v. Mahammad Syed Ali [1936] 160 PC 28 (*refd*)

Tan Sri Tan Hian Tsin v. PP [1978] 1 LNS 199 FC (*refd*)

'The August Leonhardt' [1985] 2 Lloyd's Rep 28 (*refd*)

Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC (*refd*)

A Legislation referred to:

Evidence Act 1950, ss. 115, 58(1), 65(1)(a), (c)

Other source(s) referred to:

Gatley on Libel and Slander, 10th edn, para 13.6

- B** *For the plaintiff - Gopal Sreenevasan; M/s Sreenevasan Young*
For the defendants - Sharif Mohamed (Munjeet Singh with him); M/s Sharif
& Khoo

Reported by Kumitha Abdul Majid

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JUDGMENT

Harmindar Singh Dhaliwal JC:

- D** [1] The plaintiff is a company doing contracting work. The defendants were, at the relevant time, advocates and solicitors practicing as Messrs. Blanche Kayveas & Co. The plaintiff claims that by a letter dated 1 February 1997, a sum of RM470,000 was deposited *vide* DCB Bank Bhd cheque No. 270010 with the defendant's firm. This sum was to be held by the defendants' firm as stakeholder to abide the securing of a roadwork project by the plaintiff in joint venture with a company known as Dolomite Engineering Sdn Bhd ("Dolomite"). As no details or information pertaining to the said roadwork project was forthcoming, the plaintiff wrote a letter dated 10 March 1997 to the defendants for return of the said sum.

- E** [2] The defendants, however, refused to return the said sum claiming that although they had received the said sum of RM470,000, there was no such stakeholder agreement between the plaintiff and the defendants. The defendants contended that their only role was to release the said sum to the solicitors for one Uniquet Sdn Bhd ("Uniquet") which they did. They contended that Uniquet were the consultants for processing the said roadwork project. Given this stand taken by the defendants, the plaintiff accordingly filed this claim for the return of the said sum. The defendants not only resisted the claim but in turn filed a counter-claim for damages for RM200 million for defamation for the filing of this wrongful action as they put it.

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The Facts

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[3] The evidence for the plaintiff disclosed that PW1, the managing director of Dolomite at that time, met with the 1st defendant sometime in late 1996 and early 1997. The meeting was to discuss the possibility of securing projects for the plaintiff and Dolomite. The plaintiff and Dolomite had previously done several projects on a joint venture basis. PW1 claimed that the 1st defendant told him that there was a project in the pipeline but a sum of RM470,000 was to be deposited with his firm to be held on a stakeholder basis.

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[4] Arising out of this arrangement, PW1 then personally delivered the letter dated 1 February 1997 containing the terms of the arrangement to the 1st defendant at his office as well as the cheque of the plaintiff for the sum of RM470,000. PW1 then witnessed the signature of the 1st defendant on the said document acknowledging receipt. The said letter appears as follows:

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Our ref: C/HI/PCSB/073

1st February 1997

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Blanche Kayveas & Co
#29A Jalan Maharajalela
50150 Kuala Lumpur

Attention: YB Datuk Kayveas

Dear YB Datuk,

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Roadwork Project For Peninsular Concord Sdn Bhd And
Dolomite Engineering Sdn Bhd Joint Venture

(I) We have been advised by you that there is currently a roadwork project in the market. As requested by you, we are now enclosing our cheque No. DCB 270010 for Ringgit Malaysia Four Hundred and Seventy Thousand Only (RM470,000) to be held by your firm as stakeholder pending the award of the said roadwork project.

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It is our understanding that the said stakeholder sum of RM470,000 will be refunded to us in the event that the said roadwork project is not awarded to "Peninsular Concord Sdn Bhd and Dolomite Engineering Sdn Bhd Joint Venture" (hereinafter referred to as "PC-DE JV").

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We have been informed that upon receipt of the above stakeholder sum, you will extend to us all details and information pertaining to the said roadwork project for our evaluation of its feasibility and viability.

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A Should we be satisfied with the feasibility and viability of the said project upon receipt of the principal's letter of award for the roadwork project, we will officially inform you to authorize the release of the said stakeholder sum to the relevant party(ies) to be advised by you, in order to secure the said project.

B (II) After the award of the roadwork project to PC-DE JV, we will arrange for a further placement of RM470,000.00 with your firm for your remittance to the relevant party(ies) to be advised again by you.

C (III) After the receipt of the first payment from the principal of the roadwork project by PC-DE JV, we shall place a further RM1,410,000 with your firm for your necessary transmission.

D We trust that the above are agreeable by you and would appreciate if you could sign and return the duplicate of this letter to confirm your agreement to the above and to acknowledge receipt of the said cheque of RM470,000 as stakeholder sum.

E Thank you.

Yours faithfully,
Peninsular Concord Sdn Bhd
Tuan Haji Harun Ibrahim

F Chairman

I/We hereby agree to above and acknowledge receipt of the cheque of RM470,000.

G [5] At the bottom of the letter, there was a rubber stamp of the firm of Blanche Kayveas & Co, Advocates and Solicitors, indicating receipt on 4 February 1997 at 12.25pm with the signature of the 1st defendant as alleged by PW1. Now there were some objections raised by the defendants with regards to the said letter and I will come to these objections in a moment.

H [6] After sending out this letter and the cheque, the plaintiff and PW1 were expecting to hear from the 1st defendant. After waiting for more than a month and with no response forthcoming, the plaintiff and PW1 decided to secure the return of the sum of RM470,000.

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[7] A letter dated 10 March 1997 was then sent out by the plaintiff to the defendants' firm seeking the return of the said sum of RM470,000. In return, the defendants' firm prepared a letter dated 14 March 1997 enclosing a cheque for the said sum. On the same day, PW3, who is currently the managing director of Dolomite, went to the defendants' firm expecting to collect the cheque. He discovered, however, that it was a post-dated third party cheque and refused to accept it. A letter of demand followed for the return of the said sum.

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[8] For the defendants, the 1st defendant, in his testimony, said that Uniquet acted as the consultants to negotiate a roadwork project for Dolomite. One of the terms was to deposit a sum of RM470,000 being 1% of the total value of the project which sum had to be paid to Uniquet before the commencement of any negotiation. He claimed that his legal firm acted for Dolomite and not the plaintiff in the release of the said sum of RM470,000 to Messrs Hullon & Co who were a firm of advocates and solicitors acting for Uniquet. He relied on a letter dated 24 January 1997 from Uniquet to the defendants to set out the duty of the defendants to release the said sum of RM470,000. He also claimed that the refusal of the plaintiff to accept the money when it was being returned caused an injustice to him and his legal firm. He further claimed that whatever that had transpired was probably a plot by someone to embarrass him and his legal firm.

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[9] DW2, who was the managing director of Uniquet, told the court that it was agreed between him and PW1 that the sum of RM470,000 was to be paid to Uniquet or to him. Eventually the said sum was paid over to him personally at the request of Uniquet. Interestingly, PW1 denied ever meeting DW2 and claimed that the letter of 24 January 1997 together with some of the other letters of the defendants were contrived to defeat the plaintiff's application for summary judgment.

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The Issues

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[10] Arising out of their competing assertions, it appeared to me that the sole issue upon which this matter ought to be decided is whether, upon a construction of the terms of the letter dated 1 February 1997, the defendants accepted the said sum of RM470,000 as stakeholders. If so, the question that follows is whether the monies paid were in breach of the terms of the agreement as set out in the letter. As for the counter-claim, the issue was whether the defendants were entitled to damages.

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A [11] In resolving these issues, it became important to construe the terms of the all important letter of 1 February 1997. However, as I had alluded to earlier, there were some serious objections to the said letter by the defendants. What were these objections?

B **Authenticity Of The Letter Of 1 February 1997**

C [12] The defendants were disputing both the authenticity and contents of the letter dated 1 February 1997 (“the said letter”) on the ground that the original was not produced in court. The 1st defendant also appears to suggest in his evidence that the said letter may not have been the letter that he acknowledged and even went on to dispute the rubber stamp as the one belonging to his firm.

D [13] In this regard, it is necessary to recap the evidence of PW1 who was the person dealing with the 1st defendant. PW1 told the court that he was the one who discussed the terms of the stakeholding with the 1st defendant. He also delivered the letter dated 1 February 1997 (marked as ID1) and witnessed the signature of the 1st defendant. The duplicate of the said letter, as stated in the letter itself, was taken by him. The 1st defendant, however, gave evidence that the original letter was given back to PW1 to make corrections and that therefore he did not keep a copy for that reason. He now appears to suggest that he does not know if the letter marked as ID1 is the same document that he had signed.

G [14] Having considered all the evidence in this case, I find the stance adopted by the 1st defendant to be rather odd. In the first place, in para. 4 of the statement of claim, the plaintiff had pleaded that the claim was based upon an agreement evidenced by the said letter of 1 February 1997. In their defence, the defendants have made no assertion anywhere that the said letter was not received or executed. It is only stated that there was no agreement.

H [15] Secondly, the defendants appear to have conceded on the issue of acknowledging receipt of the said letter in the statement of agreed facts signed by both solicitors on 22 November 2007 (encl. 90). At para. 2 of the same, it is stated:

I 2. The Plaintiff had deposited a sum of RM470,000.00 under the DCB Bank Berhad Cheque no 270010 with the defendants’ Firm. The Defendants’ firm acknowledged receipt of the Plaintiff’s letter dated 1.2.1997.

[16] The effect of such a statement is set out in s. 58(1) of the Evidence Act 1950 which reads: A

58. Facts admitted need not be proved.

(1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading: B

Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions. C

[17] It is also noteworthy that in his evidence in chief, the 1st defendant admitted that his firm received the letter of 1 February 1997 which letter the 1st defendant confirmed appeared at pp. 6 & 7 of the bundle B3. He was only unhappy with some of the contents stated in the letter. However, during cross-examination, the 1st defendant suddenly made an about turn and expressed some doubts on the authenticity of the same said letter which he had earlier confirmed. D E

[18] Given this state of affairs, I agree with the contention of learned counsel for the plaintiff that the defendants are now estopped from changing their position in a way that is inconsistent with what had been agreed in relation to the said letter. In relation to the law on estoppel, s. 115 of the Evidence Act 1950 ("EA") provides: F

When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing. G

[19] In the instant case, the plaintiff is relying specifically on estoppel by convention. In *'The August Leonhardt'* [1985] 2 Lloyd's Rep 28, Kerr LJ stated: H

We deal first with estoppel by convention. A convention statement of this principle is to be found in the following passage in *Spencer Bower and Turner on Estoppel by Representation* (3rd Ed) at I

A p 157 which was cited with approval by Eveleigh and Brandon LJ (as they then were) in *Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] 1 Lloyd's Rep 27; [1982] QB 84 at pp. 126 and 130 as follows:

B This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed by the convention of the parties as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given statement of facts is to be accepted between them as true, then as regards that transaction, each will be estopped against the other from questioning the truth of the statement of facts so assumed. (as applied in *Wardley Ltd v. Bestland Development Pte Ltd (in liquidation) & Anor And Other Appeals* [1992] 2 SLR 961).

E [20] I cannot help making the observation that if indeed the 1st defendant is saying that there could be another letter or corrected letter surely he will be able to produce it or at the very least, he would have asked for it to be produced. He cannot now try to sidestep the said letter of 1 February 1997 merely on a simple unsubstantiated assertion that it may not be the letter that he had acknowledged. I can only think that he is doing so as an afterthought.

F [21] On the issue of the non-production of the original, in view of my earlier observation on the said letter, I am convinced that the original must have been kept by the 1st defendant and the duplicate returned to PW1. That would be the logical thing to do as after having acknowledged receipt of it, the defendants would certainly want to keep it. If that was not the case, as the 1st defendant is now appearing to allege, I am unable to see how the defendants were able to write the letters dated 1 February 1997 and 4 February 1997 alluding to the contents of the impugned letter. Additionally, I cannot imagine any firm of solicitors not keeping a copy of the letter in which they are acknowledging receipt of a cheque especially one for a substantial amount of money. Solicitors are by and large meticulous record-keepers.

I [22] The plaintiff was also unable to produce their own copy of the said letter. However, there was evidence from PW2, the chairman and managing director of the plaintiff, that their copy

was given to their previous solicitors Messrs. Raja Eleena Siew Ang & Associates. The plaintiff had written to the said solicitors for the files in a letter dated 27 February 2007 (exh. P4). The said solicitors replied that they did not have the files with them. This was not seriously challenged by the defendants.

[23] On the question of admissibility of secondary evidence, s. 65(1)(a) of the EA provides that secondary evidence may be given of the existence, condition or contents of a document admissible in evidence where the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved. A notice to produce as provided in s. 66 of the EA must first be issued. In the instant case, although notice was issued late because of the defendants sudden change of position, I considered that no such notice was necessary as from the nature of the case, the defendants must know that they will be required to produce it (see s. 66 Proviso (b) EA). In any event under this provision, “the court has absolute power, when it thinks fit, to dispense with the notice” (per Sir George Rankin in *Surendra Krishna Roy v. Mahammad Syed Ali* [1936] 160 PC 28 at 32).

[24] Recourse can also be had to s. 65(1)(c) of the EA which provides for the admissibility of secondary evidence when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any reason not arising from his own default or neglect produce it in reasonable time (see *Tan Sri Tan Hian Tsin v. PP* [1978] 1 LNS 199).

[25] For all the reasons aforesaid, I am more than satisfied that the said letter of 1 February 1997 marked as ID1 can be admitted as secondary evidence under s. 65 of the EA.

Do The Terms Of The Said Letter Reflect A Stakeholding Agreement?

[26] The question that follows is whether the terms in the said letter of 1 February 1997 reflect a stakeholding agreement? The law on stakeholding is fairly settled. In *Maloney v. Hardy* [1970] 216 EG 1582, it was held:

A stakeholder properly so called holds money in medio to abide an event: he holds for both parties and not for either alone pending the event. But when there is no contract for sale in

- A existence the purchaser's deposit is in no way bound; he may at any moment demand his own money back from the agent, saying that he no longer wishes to negotiate, and the agent must repay him.
- B [27] In *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400, Hashim Yeop Sani SCJ appraised the law relating to stakeholding as follows at 402:
- C What is in essence stakeholding? The word "stake" is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held.
- D In sale and purchase agreement cases, the position is put clearly by Lord Edmund-Davies in *Sorrell v. Finch* [1977] AC 728 who repeated what was said in *Maloney v. Hardy* [1970] 216 EG 1582:
- E The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding that deposit may part with it to neither contracting party without the consent of the other ...
- F In other particular case of sale and purchase whether a person receiving the deposit is to be considered as an agent for the vendor or for the purchaser or for both as principal or as trustee is a question of law depending on the circumstances of the transaction as a whole. The learned Judge concluded that in this case the appellant received the deposit as agent for the respondents in a fiduciary capacity and therefore on general principles he would be accountable.
- G In *Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell v. Finch (supra)*. He said:
- H If an estate agent or solicitor, being duly authorized in that behalf, receives a deposit "as stakeholder", he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as
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agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v Trustee of Property of Reed* ([1967] 2 All ER 1286 at 1289), per Cross J. Until the event is known, it is duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it; see *Harington v. Hoggart* ([1830] 1 B & AD 577). If the purchaser should become entitled to the return of his deposit, he must sue the estate agent for solicitor for it: *Eltham v. Kingsman* ([1818] 1 B & AD 683) and *Hampden v. Walsh* ([1876] 1 WBD 189). He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

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Pennycuik V.C. in *Potters v. Loppert* [1973] 1 All ER 658 at p. 661 considered the law in relation to contract deposits. Where money is placed in medio in the hands of a third party to await an event as between two other parties the third party receives that property as trustee and that the property and the investments for the time being representing it represent his trust estate. Certainly the money may be paid to the third party as trustee, but equally it may be paid to him as principal on a contractual or quasi-contractual obligation to pay the like sum to one or other of the parties according to the event. It must depend on the intention of the parties, to be derived from all the circumstances, including any written documents, in which capacity the third party receives the money.

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[28] It seems to me therefore that a stakeholding duty arises where money is paid to a solicitor pending the outcome of a future event and he holds such money as trustee until the event is known. What he has to do then will depend on the agreement of the parties. I think this was precisely the sort of arrangement that existed in the instant case.

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[29] In the instant case, the terms of the arrangement were explicit. To recap, the relevant terms in the letter of 1 February 1997 were:

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- (a) that upon receipt of the stakeholding sum, the 1st defendant was to extend details and information regarding the project, and
- (b) once the plaintiff was satisfied with the feasibility and viability of the project and upon receipt of the letter of award the plaintiff would officially inform the defendants to authorize the release of the stakeholder sum.

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- A [30] The defendants, however, argued that the instant case was not one of a stakeholding because there was no pending outcome of a future event. They sought to rely on an earlier letter dated 24 January 1997 from Uniquet to the defendants to set out their duty to release the said sum of RM470,000 even before the commencement of negotiations. This arrangement was rather unusual in itself. The last paragraph of the said letter bears this out:

- C We hope the above is clear and upon receipt of the first 1% to be deposited to your legal firm as stakeholders by Dolomite Industries Co Sdn Bhd must be released to us within 14 days of this letter for us to commence our negotiation. Failing which the project shall not be made available to Dolomite Industries Co Sdn Bhd and we are free to negotiate the same project to any other interested party and your client shall have no further claim against us. Please be informed that all payments made is not refundable.

- E [31] The plaintiff says this letter was contrived but it was confirmed to be authentic by DW2 who wrote it. What this means is that there appeared to be a conflict between the parties as to the event that would trigger the release of the sum of RM470,000 deposited with the defendants. Even so, the question is - can the defendants then choose to pay Uniquet and ignore the explicit terms of the letter of 1 February 1997 as to when payment can be effected?

- F [32] In this regard, the 1st defendant has taken pains to point out that his legal firm may face a lawsuit for jeopardizing a RM400 million plus project if it fails to effect payment of the stakeholder sum. He claims that it was safer for him to effect payment and he will then get the plaintiff to amend their letter of 1 February 1997.

- G [33] Even adopting the most charitable view of the position that the defendants were taking, what stands out however is how any solicitor can think that he could ignore the explicit terms of a payment arrangement in the hope that he could persuade the parties to somehow change those terms. The logical thing to do, if the defendants were uncomfortable or unhappy with such terms, would be to return the cheque and the letter with the response that we are unable to help you.

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[34] As it turned out, there was no such amendment to the terms except for some letters by the defendants which the plaintiff says were all contrived. Contrived or not, what is significant is that there was no response at all by the plaintiff to the defendant's letters thus fueling suspicion that the defendants' letters were manufactured. The net result is that the terms of the letter of 1 February 1997 are effective and cannot be willy-nilly disregarded by the defendants.

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[35] The terms of the said letter clearly reflected a stakeholding arrangement as the release or payment awaited the occurrence of a future event. That future event was information leading to the satisfaction of the plaintiff of the feasibility and viability of the project and authority to release the stakeholder sum. In any event, whatever label you may put on the arrangement, the crux is that the defendants were bound by the terms of the arrangement which they had accepted.

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Was There A Breach Of The Stakeholding Agreement?

[36] It was not disputed that no details and information regarding the project were provided and importantly, the plaintiff never authorized the defendants to release the sum of RM470,000. As a result, there was a breach by the defendants of the terms of the stakeholding arrangement. It must therefore follow that the plaintiff is entitled to recover the stakeholder sum.

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[37] In coming to this view, I had not overlooked the contention of the defendants that they were not acting for the plaintiff and that therefore there was no privity of contract. If that was indeed the case, it was open to the defendants to decline acceptance of the cheque when it was first delivered. However, once they had accepted the cheque, they became bound to the terms under which the cheque was given. I fail to see how there was no privity when the letter of 1 February was addressed to the defendants by the plaintiff. For these reasons, the contention of no privity of contract does not bite.

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Counter-claim

[38] The defendants have a counter-claim for RM200 million against the plaintiff for loss of reputation by reason of this suit. No evidence was however led to support this claim apart from the oral testimony of the 1st defendant that the defendants suffered

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- A from a lot of embarrassment from reports in the media as well as from investigations by the authorities. The plaintiff, however, says that this counter-claim was meant for no other purpose than to intimidate them. They rely on absolute privilege.
- B [39] Absolute privilege provides complete immunity from liability for a person's statements. The accuracy of such statements as well as the motives of the person making the statements is irrelevant. This defence is generally available only for parliaments and the courts. The rationale for providing this immunity is that
- C free communication is so vital for the proper functioning of the institutions of parliament and the courts that it must override any individual's interest in protecting his or her reputation.
- D [40] According to *Gatley on Libel and Slander*, 10th edn, para 13.6, absolute privilege in a court of justice can be divided into three categories. In this regard, reference was made to the statement by Devlin LJ in *Lincoln v. Daniels* [1962] 1 QB 237 at 257:
- E The first category covers all matters which are done coram judice. This extends to everything that is said in the course of proceedings by judges, parties, counsel and witnesses, and includes the contents of documents put in as evidence. The second covers everything that is done from the inception of the proceedings onwards and extends to all pleadings and other
- F documents brought into existence for the purpose of proceedings and starting with the writ or other document which institutes the proceedings. The third category is the most difficult of the three to define. It is based on the authority of *Watson v. M'Ewan* in which the House of Lords held that the privilege attaching to evidence which a witness gave coram judice attached to the
- G precognition or proof of that evidence taken by a solicitor. It is immaterial whether the proof is or is not taken in the course of proceedings.
- H [41] As far as the instant case is concerned, what is relevant is that absolute privilege will attach to all matters beginning with the institution of the suit together with the statements made in the pleadings and other documents in the course of proceedings. For this reason, the defendants' counter-claim cannot succeed.

I

Result

[42] In the premises, the plaintiff is entitled to judgment for the sum of RM470,000 against the defendants. The plaintiff is also entitled to interest on the said sum at the rate of 8% per annum from the date of the writ of summons until realisation. The counter-claim of the defendants is dismissed. The plaintiff is also entitled to one set of costs which, after hearing the parties, I assess at RM35,000.

A**B****C****D****E****F****G****H****I**